

1  
2  
3  
4  
5  
6  
7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
10

11 JOHN BROWN,

12 Plaintiff,

13 v.

14 TAKEUCHI MFG. CO. (U.S.), LTD., et  
15 al.,

16 Defendants.  
17

No. 2:21-CV-0392-JAM-DMC

ORDER

18 Plaintiff, who is proceeding with retained counsel, brings this civil action.  
19 Pending before the Court is Defendant's motion to compel Plaintiff to provide initial responses to  
20 written discovery, ECF No. 120. Plaintiff has filed an opposition, ECF No. 121. Defendant has  
21 filed a reply, ECF No. 127. The matter has been submitted on the papers without oral argument.  
22 See ECF No. 130.  
23

24 **I. BACKGROUND**

25 This matter was first before the Court on Defendant's motion to compel Plaintiff to  
26 provide discovery responses. See ECF No. 74. Plaintiff failed to oppose the motion, which the  
27 Court granted on January 17, 2023. See ECF No. 81. Plaintiff was directed to provide discovery  
28 responses within 30 days of the date of the Court's order. See id. Defendant then filed a motion

1 to compel Plaintiff to produce supplemental initial disclosures. See ECF No. 82. Again, Plaintiff  
2 failed to file any opposition to the motion, which the Court granted on March 22, 2023. See ECF  
3 No. 86. As with the previous discovery order, Plaintiff was directed to produce supplemental  
4 initial disclosures within 30 days of the date of the Court's order. See id.

5 As of February 28, 2023, Plaintiff had not complied with the Court's January 17,  
6 2023, order, and Defendant filed a motion for terminating sanctions. See ECF No. 85. Plaintiff  
7 filed an opposition. See ECF No. 88. The parties appeared for a hearing on April 19, 2023. See  
8 ECF No. 96 (minutes). In the opposition brief, and at the hearing, Plaintiff's counsel represented  
9 that he has been "sick on and off since June 2022," that counsel contracted Covid-19, which  
10 turned into pneumonia, and that he now suffers from "long-Covid" which most recently caused  
11 illness on March 8, 2023. ECF No. 88.

12 On April 21, 2023, the Court issued an order regarding the motion for terminating  
13 sanctions. See ECF No. 97. The Court provided Plaintiff's counsel one further opportunity to  
14 comply with the Court's January 17, 2023, order. See id. Specifically, the Court stated that, if  
15 Plaintiff complied and filed a notice of such compliance on or before April 26, 2023, the Court  
16 would recommend denial of Defendant's motion for terminating sanctions. See id. Plaintiff's  
17 counsel filed a notice of compliance on April 26, 2023, indicating that he had served responses to  
18 discovery requests as ordered on January 17, 2023. See ECF No. 101. On August 18, 2023, the  
19 Court issued findings and recommendations that Defendant's motion for terminating sanctions be  
20 denied. Defendant filed objections on September 1, 2023. See ECF No. 112. Plaintiff filed a  
21 response to Defendant's objections on September 7, 2023. See ECF No. 115. The District Judge  
22 adopted the findings and recommendations in full on September 14, 2023. See ECF No. 117.

23 On August 25, 2023, Defendant filed a third motion to compel Plaintiff's  
24 attendance at his deposition. See ECF No. 109. Following a hearing, the Court directed that  
25 Plaintiff attend his deposition on September 20, 2023. See ECF No. 119. Defendant's motion to  
26 compel Plaintiff's attendance at his deposition has been denied as moot. See ECF No. 131.

27 ///

28 ///

1 Finally, as to scheduling, the most current stipulated modification to the original  
2 scheduling order provides as follows: expert disclosures due by November 17, 2023; all discovery  
3 completed by January 24, 2024; dispositive motions are scheduling for hearing before the District  
4 Judge on April 23, 2024; a final pre-trial conference is set before the District Judge on May 24,  
5 2024; and a jury trial is set to commence before the District Judge on July 22, 2024. See ECF No.  
6 107.

## 8 II. DISCUSSION

9 In the current motion to compel, Defendant argues that Plaintiff has failed to  
10 provide timely responses to special interrogatories, sets two and three. See ECF No. 120-1.  
11 Defendant's discovery requests are attached to the Declaration of defense counsel Neil  
12 Kleibensten, Esq., at Exhibit A. See ECF No. 120-3. Defendant's special interrogatories, set  
13 two, were served on July 25, 2023. See id. Defendant's special interrogatories, set three, were  
14 served on August 17, 2023. See id. No responses had been received as of the date Defendant  
15 filed the pending motion to compel on December 6, 2023. See ECF No. 120-2 (Kleibenstein  
16 declaration).

17 In his opposition, Plaintiff states that verified responses to both outstanding  
18 discovery requests were served on December 4, 2023, and that the current motion, including  
19 request for reasonable expenses, is moot. See ECF No. 121. Copies of Plaintiff's verified  
20 responses are attached to Plaintiff's opposition as Exhibits A and B. See id. at 4-13.

21 Given that responses have now been provided, the current motion is moot. As to  
22 an award of reasonable expenses for the current motion required by Federal Rule of Civil  
23 Procedure 37(a)(5), Defendant argues in the reply brief that the issue is not moot because,  
24 contrary to Plaintiff's indication, the discovery responses were not "provided" prior to the motion  
25 to compel being filed on December 6, 2023. According to Defendant, while the responses  
26 indicate a service date of December 4, 2023, the responses were sent in the same envelope as  
27 Plaintiff's opposition, served on December 8, 2023, and not received by defense counsel until  
28 after December 6. Thus, because the responses were purportedly served but not actually

1 “provided” before the motion to compel was filed, Defendant concludes that an award of  
2 reasonable expenses is warranted and appropriate.

3 Defendant’s argument is persuasive. Rule 37(a)(5)(A) specifically uses the term  
4 “provided,” not “served.” Here, because the discovery responses were not provided to defense  
5 counsel before the motion was served, Plaintiff will be ordered to pay Defendant’s reasonable  
6 expenses for the current motion to compel.<sup>1</sup> The Court will accept defense counsel’s declaration  
7 as to reasonable expenses and permit Plaintiff to file a response thereto. Following submission of  
8 declarations, the Court will issue an order awarding reasonable expenses or, if deemed necessary,  
9 set a further hearing.

### 10 11 **III. CONCLUSION**

12 Accordingly, IT IS HEREBY ORDERED as follows:

- 13 1. Defendant’s motion to compel, ECF No. 120, is DENIED as moot.
- 14 2. Defense counsel shall submit a declaration supporting an award of  
15 reasonable expenses within 14 days of the date of this order.
- 16 3. Plaintiff may file a response to defense counsel’s declaration within 7 days  
17 of the date of service thereof.

18  
19 Dated: January 25, 2024



20 DENNIS M. COTA  
21 UNITED STATES MAGISTRATE JUDGE

22  
23  
24  
25  
26  
27  
28 <sup>1</sup> The Court has previously awarded expenses in connection with the prior motions which the Court  
granted. See ECF No. 100.